79-2029

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-2029

A. A. HOEHLING,

Petitioner,

vs.

UNIVERSAL CITY STUDIOS, INC., and MICHAEL MACDONALD MOONEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT UNIVERSAL CITY STUDIOS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Counterstatement of Questions Presented 1

Counterstatement of the Case 2

Reasons for Denying the Writ:

I. Ideas and theories are not copyrightable. 5

A. Petitioner's So-Called Original Theory. 6

B. Petitioner's alleged similarities are all based upon historical facts, purported facts or *scenes a faire* and consequently there is no substantial similarity of copyrightable material as a matter of law. 8

(i) Historical Facts 8

(ii) Purported Facts 11

(iii) *Scenes a Faire* 13

II. No conflict amongst the circuits exists. 15

III. The Court should consider only the allegedly infringing work. 17

IV. Summary judgment was appropriate in the present action. 20

V. Absent infringement, petitioner's unjust enrichment claim based upon unfair competition was also correctly dismissed. 22

Contents

Page

Conclusion 23

Appendix R1a

TABLE OF CITATIONS

Cases Cited:

Alexander v. Haley, 460 F. Supp. 40 (S.D.N.Y. 1978) ...5, 13, 21

American Code Co. v. Bensinger, 282 Fed. 829 (2d Cir. 1922) 8

Arnstein v. Porter, 154 F. 2d 464 (2d Cir. 1946) 20, 21

Arc Music Corp. v. Lee, 296 F. 2d 186 (2d Cir. 1962) 14

Baker v. Selden, 101 U.S. 99 (1879) 5

B.H. Bunn Co. v. AAA Replacement Parts, 451 F. 2d 1254 (5th Cir. 1971) 22

Becker v. Loew's Inc., 133 F. 2d 889 (7th Cir.), cert. denied, 319 U.S. 772 (1943) 7

Bon Air Hotel v. Time, Inc., 426 F. 2d 858 (5th Cir. 1970) .. 21

Brownfield v. Landon, 307 F. 2d 389 (D.D.C.), cert. denied, 371 U.S. 924 (1962) 21, 22

Buckler v. Paramount Pictures, Inc., 133 F. Supp. 223 (S.D.N.Y. 1955) 21

Contents

Page

Cain v. Universal Pictures Co., 47 F. Supp. 1013 (S.D. Cal. 1942) 17

Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964) 22

Costello v. Loew's Inc., 159 F. Supp. 782 (D.D.C. 1958) 21

Dave Grossman Designs, Inc. v. Bortin, 347 F. Supp. 1150 (N.D. Ill., E.D. 1972) 6

Davies v. Bowes, 209 Fed. 53 (S.D.N.Y. 1913), aff'd, 219 Fed. 178 (2d Cir. 1914) 12

Dellar v. Samuel Goldwyn, Inc., 150 F. 2d 612 (2d Cir. 1945), cert. denied, 327 U.S. 790 (1946) 5

DeMontijo v. Twentieth Century-Fox Film Corp., 40 F. Supp. 133 (S.D. Cal. 1941) 8, 18

Dictograph Products Co. v. Sonotone Corp., 230 F. 2d 131 (2d Cir. 1956) 21, 22

Dressler v. M.V. Sandpiper, 331 F. 2d 130 (2d Cir. 1964) ... 20

Dugan v. American Broadcasting Corporation, 216 F. Supp. 763 (S.D. Cal. 1963) 21

Echevarria v. Warner Brothers Pictures, Inc., 12 F. Supp. 632 (S.D. Cal. 1935) 9

Eisenschiml v. Fawcett Publications, Inc., 246 F. 2d 598 (7th Cir.), cert. denied, 355 U.S. 907 (1957) 5, 16, 17

Contents

Page

Fuld v. National Broadcasting Company, 390 F. Supp. 877 (S.D.N.Y. 1975) 5, 8, 10, 18, 21

GAF Corp. v. Circle Floor Co., 329 F. Supp. 823 (S.D.N.Y. 1971), aff'd, 463 F. 2d 752 (2d Cir. 1972), cert. dismissed, 413 U.S. 901 (1973) 22

Gardner v. Nizer, 391 F. Supp. 940 (S.D.N.Y. 1975) 8, 21

Goldstein v. California, 412 U.S. 546 (1973) 23

Greenbie v. Noble. 151 F. Supp. 45 (S.D.N.Y. 1957) 8, 11, 12

Huie v. National Broadcasting Company, 184 F. Supp. 198 (S.D.N.Y. 1960) 12

Ideal Toy Corp. v. Kenner Products, 443 F. Supp. 291 (S.D.N.Y. 1977) 23

Jacobs v. Robitaille, 406 F. Supp. 1145 (D.N.H. 1976) 23

Kirby v. P.R. Mallory & Co., Inc., 489 F. 2d 904 (7th Cir. 1973), cert. denied, 417 U.S. 911 (1974) 21

Lake v. Columbia Broadcasting System, Inc., 140 F. Supp. 707 (S.D. Cal. 1956) 8, 12

Middle Atlantic Utilities Co. v. S.M.W. Development Corp., 392 F. 2d 380 (2d Cir. 1968) 21, 22

Miller v. Universal City Studios, Inc., 460 F. Supp. 984 (S.D. Fla. 1978) 17

Millstein v. Leland Hayward, Inc., 10 F.R.D. 198 (S.D.N.Y. 1950) 20

Contents

Page

Miner v. Employers Mutual Liability Ins. Co., 229 F. 2d 35 (D.C. Cir. 1956) 21

Musto v. Meyer, 434 F. Supp. 32 (S.D.N.Y. 1977), aff'd without opinion, 598 F. 2d 609 (2d Cir. 1979) 5, 7, 21

Myers v. Mail & Express Company, 36 C.O. Bull. 478 (S.D.N.Y. 1919) 10

Nichols v. Universal Pictures Corp., 45 F. 2d 119 (2d Cir.), cert. denied, 282 U.S. 902 (1930) 5, 6

Norman v. Columbia Broadcasting System, Inc., 333 F. Supp. 788 (S.D.N.Y. 1971) 8, 10, 14, 16

Oxford Book Co. v. College Entrance Book Co., 98 F. 2d 688 (2d Cir. 1938) 8

Public Affairs Associates, Inc. v. Rickover, 284 F. 2d 262 (D.C. Cir. 1960) 17

Reyher v. Children's Television Workshop, 533 F. 2d 87 (2d Cir. 1976) 5, 13, 14

Richards v. Columbia Broadcasting System, Inc., 161 F. Supp. 516 (D.D.C. 1958) 10

Rosemont Enterprises, Inc. v. Random House, Inc., 366 F. 2d 303 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967). 5, 8, 16

Rosen v. Loew's, Inc., 162 F. 2d 785 (2d Cir. 1947) 20

Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 255 (1964) ... 22

Contents

Page

SEC v. Research Automation Corporation, 585 F. 2d 31 (2d Cir. 1978) 20

Shipman v. R.K.O. Radio Pictures, Inc., 100 F. 2d 533 (2d Cir. 1938) 8

Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F. 2d 1157 (9th Cir. 1977) ... 8

Sinatra v. Goodyear Tire & Rubber Co., 435 F. 2d 711 (9th Cir. 1970) 23

Toksvig v. Bruce Publishing Co., 181 F. 2d 664 (7th Cir. 1950) 15, 16, 17

Triangle Publications, Inc. v. Sports Eye, Inc., 415 F. Supp. 682 (E.D. Pa. 1976) 23

Uneeda Doll Co. v. P&M Doll Co., 353 F. 2d 788 (2d Cir. 1965) 5

Universal Athletic Sales Co. v. Salkeld, 511 F. 2d 904 (3d Cir.), cert. denied, 423 U.S. 863 (1975) 5

Constitution and Statutes Cited:

U.S. Con. Art. I, §8, cl. 8 7

17 U.S.C. §1 2

28 U.S.C. §1291(b) 3

Copyright Act of 1976, Pub. L. No. 94-533 2

Contents

Page

Rules Cited:

Fed. Rules of Civil Practice, Rule 56(b) 2

Supreme Court Rules, Rule 17 17

Treatises and Law Review Articles Cited:

Moore's Federal Practice ¶56.17(14) 20

Nimmer on Copyright (perm. ed. rev. 1980):

§2.11(A) 15

§3.04 15

§13.01(B) 21

§13.03(A) 21

Yankwich, Originality in the Law of Intellectual Property, 11 F.R.D. 457 (1951) 13, 14

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Second Circuit Court of Appeals correctly rule that ideas, theories, facts and research per se are not copyrightable?

2. Did the Second Circuit Court of Appeals correctly rule that once allegedly infringed elements of petitioner's book were found not to be capable of copyright protection, those elements could not be protected by state law either, *i.e.*, does the doctrine of federal preemption apply?

COUNTERSTATEMENT OF THE CASE

This action was brought pursuant to 17 U.S.C. §1 *et seq.*[1] by petitioner A. A. Hoehling, the author of the book entitled *Who Destroyed the Hindenburg*? Respondent Universal City Studios, Inc. (hereinafter "Universal"), is the motion picture studio which produced the allegedly infringing motion picture entitled "The Hindenburg" (hereinafter the "motion picture" or "film"). Michael MacDonald Mooney (hereinafter "Mooney"), also a respondent, is the author of the book *The Hindenburg* which was purchased by Universal. The United States District Court for the Southern District of New York entered summary judgment in favor of respondents and dismissed the action and the United States Court of Appeals for the Second Circuit, finding many of petitioner's allegations "patently frivolous" (A13),[2] affirmed the judgment of the district court. Petitioner seeks a writ of certiorari to review that judgment.

On December 23, 1975, petitioner applied to the United States District Court, District of Columbia, for a temporary restraining order and preliminary injunction to prevent release of Universal's film. Universal opposed the motion and moved for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure. On that same date, Judge Smith denied petitioner's motions and deferred consideration of Universal's motion for summary judgment.

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1. On January 1, 1978 the Copyright Act of 1976, Pub. L. No. 94-553, went into effect. This action was brought under the copyright laws of the United States as they existed prior to January 1, 1978, commonly referred to as the Copyright Act of 1909.

2. References to "A" signify petitioner's appendices.

In an order dated July 15, 1976, Judge Smith denied Universal's motion. Universal then sought leave to take an interlocutory appeal pursuant to 28 U.S.C. §1291(b), but leave was denied.

The case was eventually transferred to Judge Charles M. Metzner of the United States District Court, Southern District of New York. Further discovery was conducted throughout the remainder of 1976, and through parts of the years 1977, 1978 and 1979 by petitioner and respondents.

On October 19, 1978, Universal renewed its motion for summary judgment. Later, in 1979, respondent Mooney also moved for summary judgment.

In an opinion dated August 1, 1979, the district court granted the motions for summary judgment and ordered the petitioner's complaint dismissed. Petitioner appealed to the Second Circuit Court of Appeals which affirmed the district court's dismissal in an opinion dated March 25, 1980.

Both petitioner's book and Universal's motion picture relate the last voyage of the German dirigible Hindenburg and its fiery destruction at Lakehurst, New Jersey, on May 6, 1937. The cause of the explosion that resulted in the airship's destruction has never been finally determined, but the possibility of sabotage has been widely discussed. Petitioner's book entitled *Who Destroyed the Hindenburg?* was published in 1962 and by its own words purports to be a historical "chronicle" of the Hindenburg disaster, including the events leading up to it and subsequent attempts to ascertain its cause. Petitioner's book advances the *theory* that the dirigible Hindenburg was sabotaged by a bomb planted by an actual crew member named Eric Spehl, who died in the crash.

Universal's motion picture entitled "The Hindenburg," first released in 1975, is a fictional drama set in the historical context of the Hindenburg's last voyage. The film shows the Hindenburg as the object of sabotage by an anti-Nazi crew member.

Petitioner contends that his book was infringed by Universal in that the motion picture contained material which was substantially similar to his book, to wit the sabotage of the Hindenburg by an anti-Nazi rigger crewman (SA009-011),[3] who, acting in concert with his mistress who had Communist or leftist connections, destroyed the dirigible by placing a small bomb in hydrogen cell #4 of the Hindenburg (SA029). These are the elements of petitioner's work as they concern the sabotage of the Hindenburg.

The motion picture was filmed from a screenplay written by Nelson Gidding, which was loosely based upon a screenplay story of Richard Levinson and William Link,[4] who in turn used the book *The Hindenburg* by Michael M. Mooney both as a reference work and as a springboard (JA229-230).

As early as 1956 or 1957 (five or six years *before* petitioner wrote his book), Gidding wrote a treatment of the destruction of the Hindenburg entitled "Up-Ship" (JA241-244). ("Up-Ship" is annexed as part of the Supplementary Appendix at page 138.) In that early treatment, the author focused upon the theory of sabotage through the use of a fountain pen bomb secreted on board the Hindenburg during flight, probably in gas cell #4, set to explode after landing and for the purpose of anti-Nazi propaganda. Gidding also used the device of a German army officer stationed on board to foil any attempt at sabotage.

In writing the screenplay for Universal, Gidding did his own extensive research into the Hindenburg's destruction and also expanded upon his treatment in "Up-Ship" using Richard

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3. References to "SA" and "JA" signify the Supplementary Appendix and Joint Appendix that were submitted to the Second Circuit Court of Appeals.

4. Messrs. Levinson and Link wrote an initial draft of the screenplay for the film, but because of other commitments, they could not continue work on the film (Link deposition at 6-8).

Levinson, William Link and M. M. Mooney's works only as background material (JA241-242).

The Second Circuit Court of Appeals correctly held that petitioner's interpretation of the Hindenburg's destruction, *i.e.*, his theory, was not copyrightable as a matter of law (A12), and also held that respondents were free to avail themselves of the historical facts contained in petitioner's work, whether those facts were correct or incorrect (A13). The court further held that "stock" characters and scenes, *i.e., scenes a faire,* are not copyrightable as a matter of law (A15).

REASONS FOR DENYING THE WRIT

I.

IDEAS AND THEORIES ARE NOT COPYRIGHTABLE.

It is hornbook law that ideas, concepts and theories are not copyrightable. *Baker v. Selden,* 101 U.S. 99 (1879); *Reyher v. Children's Television Workshop,* 533 F. 2d 87 (2d Cir. 1976); *Universal Athletic Sales Co. v. Salkeld,* 511 F. 2d 904 (3d Cir.), *cert. denied,* 423 U.S. 863 (1975); *Rosemont Enterprises, Inc. v. Random House Inc.,* 366 F. 2d 303 (2d Cir. 1966), *cert. denied,* 385 U.S. 1009 (1967); *Uneeda Doll Co. v. P&M Doll Co.,* 353 F. 2d 788 (2d Cir. 1965); *Eisenschiml v. Fawcett Publications, Inc.,* 246 F. 2d 598 (7th Cir.), *cert denied,* 355 U.S. 907 (1957); *Dellar v. Samuel Goldwyn, Inc.,* 150 F. 2d 612 (2d Cir. 1945), *cert. denied,* 327 U.S. 790 (1946); *Nichols v. Universal Pictures Corp.,* 45 F. 2d 119 (2d Cir.), *cert. denied,* 282 U.S. 902 (1930); *Alexander v. Haley,* 460 F. Supp. 40 (S.D.N.Y. 1978); *Musto v. Meyer,* 434 F. Supp. 32 (S.D.N.Y. 1977), *aff'd without opinion,* 598 F. 2d 609 (2d Cir. 1979); *Fuld v. National Broadcasting Company, Inc.,* 390 F. Supp. 877 (S.D.N.Y. 1975).

Mr. Hoehling nevertheless has admitted throughout this litigation, and indeed even in his petition to this Court (at page

3), that the gravamen of his complaint is that Universal took his "original story", "literary idea and concept", and "story line" (SA025; JA284). Moreover, petitioner has admitted that the language of Universal's motion picture does not follow his book (SA028). Nevertheless petitioner asks this Court to overturn the long-established rule that ideas and theories are not copyrightable. That request should be denied for many reasons.

A. Petitioner's So-Called Original Theory.

Petitioner has described his theory as — a rigger saboteur, woman co-conspirator and placement of a bomb on board the dirigible Hindenburg (Petition at 8; SA027, 029). Universal submits that even had petitioner presented this theory and even were it original with him, it is not capable of copyright protection. Indeed, it is of no import how novel or complex the theory is and it makes utterly no difference whether or not petitioner was the first to devise his theory of how and why the Hindenburg was destroyed. With respect to ideas and theories, novelty or uniqueness *does not* make them copyrightable.

> For example, Picasso may be entitled to a copyright on his portrait of three women painted in the Cubist motif. Any artist, however, may paint a picture of any subject in the Cubist motif, including a portrait of three women, and not violate Picasso's copyright so long as the second artist does not *substantially copy* Picasso's specific expression of his idea.

Dave Grossman Designs, Inc. v. Bortin, 347 F. Supp. 1150, 1156-57 (N.D. Ill., E.D. 1972). (Emphasis in original.)

Indeed as Judge Learned Hand acknowledged in *Nichols v. Universal Pictures Corp., supra,* 45 F. 2d at 121, Einstein's theory of relativity was not amenable to copyright protection

even though it was a unique, complex and valuable idea. *See Musto v. Meyer, supra.* Even if petitioner had been the first to propose the theory, that has no more effect on its copyrightability than the fact that Picasso was the first to paint a portrait of three women in the Cubist motif.

To allow a petitioner to obtain copyright protection of his theory, a mere idea, would contravene the purpose of the copyright clause of the United States Constitution, *viz.*, "[*t*]*o promote* the Progress of Science and the useful arts . . . ." U.S. Con. Art. I, §8, cl. 8. (Emphasis added.) As stated by one court:

> If an author, by originating a new arrangment and form of expression of certain ideas or conceptions, could withdraw these ideas or conceptions from the stock of material to be used by other authors, each copyright would narrow the field of thought open for development and exploitation, and science, poetry, narrative and dramatic fiction and other branches of literature would be hindered by copyright, instead of being promoted.

Becker v. Loew's Inc., 133 F. 2d 889, 891 (7th Cir.), *cert. denied*, 319 U.S. 772 (1943).

After a consideration of well-established law, both the district court (A18) and the Second Circuit (A12, 13) correctly rejected the petitioner's arguments that his idea with respect to the Hindenburg's destruction was copyrightable. Since petitioner's claims clearly are contrary to such established law, the petition should be denied.

B. Petitioner's alleged similarities are all based upon historical facts, purported facts or *scenes a faire* and consequently there is no substantial similarity of copyrightable material as a matter of law.

(i) Historical Facts

It is well-settled that petitioner cannot gain copyright protection for the historical facts contained in his book, *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F. 2d 1157, 1170 (9th Cir. 1977), *Fuld v. National Broadcasting Company, Inc., supra,* as a copyright in a work gives no copyright protection for public domain material contained therein. *Shipman v. R.K.O. Radio Pictures, Inc.*, 100 F. 2d 533 (2d Cir. 1938); *American Code Co. v. Bensinger*, 282 F.2d 820 (2d Cir. 1922); *Lake v. Columbia Broadcasting System, Inc.*, 140 F. Supp. 707 (S.D. Cal. 1956). Moreover, since the petitioner's work deals with a historical event, his burden of proof is higher in that he must show *greater* substantial similarity in order to establish a claim of infringment. *Gardner v. Nizer*, 391 F. Supp. 940, 943 (S.D.N.Y. 1975); *see Oxford Book Co v. College Entrance Book Co.*, 98 F. 2d 688 (2d Cir. 1938).

The rule does not change simply because it may have been petitioner who discovered the facts presented. *Rosemont Enterprises, Inc. v. Random House, Inc., supra; see Norman v. Columbia Broadcasting System, Inc.*, 333 F. Supp. 788 (S.D.N.Y. 1971). Succinctly stated, substantial similarity sufficient to evidence copying *may not* be inferred from similarities of two works resulting from the narration of the same historical events, *Fuld v. National Broadcasting Company, Inc., supra, Greenbie v. Noble*, 151 F. Supp. 45, 68 (S.D.N.Y. 1957), because "[w]here two stories deal with the same general subject matter, similarities of *names, events,* and *locales* are without legal significance." *Fuld v. National Broadcasting Company, Inc., supra* at 881 (emphasis added); *DeMontijo v. Twentieth Century-Fox Film Corp.*, 40 F. Supp. 133 (S.D. Cal. 1941).

Petitioner's claimed similarities involve actual individuals and events. Thus, in both works there are references to those who were on board the Hindenburg's last vogage, *e.g.*, Ernst Lehmann, Captain Pruss, Rigger Knorr, the mess boy, Joe Spah, Col. Erdmann (Ritter in the film), Eric Spehl (Boerth in the film), Chief Steward Kubis, the Doehner family (Breslau family in the film), and those on the ground who were also involved, *e.g.*, the German Ambassador to the United States, Kathie Rauch, Adm. Charles Rosendahl (Adm. Fellows in the film), Hugo Eckner, Dorothea Erdmann (Eleanor Ritter in the film), Hilda Schmidt (Freda Halle in the film), Herb Morrison, and representatives of the New York police (SA054).

In both works, actual events are discussed such as the Rauch letter (SA014-016), the Hindenburg's launch and course, the airship's delay on landing, the explosion in the rear of the craft, the confusion on board, Joe Spah's historic leap from the ship, Herb Morrison's radio commentary, and the investigation into the Hindenburg's destruction, including the theory of sabotage. These similarities are without legal significance. In *Echevarria v. Warner Brothers Pictures, Inc.*, 12 F. Supp. 632, 638 (S.D. Cal. 1935), noted copyright jurist, Judge Yankwich stated:

> One cannot build a story around a historical incident and then claim exclusive right to the use of the incident. If originality can be claimed in opposing Aguinaldo to Funston, as the plaintiff claimed in open court, then all the novels, short stories, and dramas written about the Civil War, opposing Grant and Lee, might never have been written after the first one because the author of the first one could have claimed exclusive right to the product.

As each work is based upon a historical event, similarity in mere sequencing of events is of no probative value because the sequence in both works must perforce be the same. As stated by Judge Learned Hand:

> . . . [S]ince the narration of history must proceed chronologically, — or at least, such is the convention, — the order in which the facts are reported must be the same in the case of a second supposed author.

Myers v. Mail & Express Company, 36 C.O. Bull. 478, 479 (S.D.N.Y. 1919).

In *Fuld v. National Broadcasting Company, Inc., supra*, the court, quoting from the same opinion stated:

> There cannot be any such thing as copyright in the order of presentation of the facts, nor, indeed, in their selection, although into that selection may go the highest genius of authorship, for indeed, history depends upon a selection from the undifferentiated mass of recorded facts.

390 F. Supp., *supra* at 882, quoting Judge Learned Hand in *Myers v. Mail & Express Company*, 36 C. O. Bull. 478, 479 (S.D.N.Y. 1919); *also, Norman v. Columbia Broadcasting System, Inc.*, 333 F. Supp. 788 (S.D.N.Y. 1971).

Therefore, the petitioner here cannot point to any similarity of sequencing of events alone or in conjunction with his theory as proof of substantial similarity. Neither is amenable to copyright protection.

Indeed, the court in *Richards v. Columbia Broadcasting System, Inc.*, 161 F. Supp. 516, 518 (D.D.C. 1958), noted that the crucial rule to remember is that

> [t]he fundamental idea of an original work may even be borrowed as long as the specific details of the author's literary efforts are not copied.

In practical terms this means that:

> *[t]he second author may also adopt the first author's historical ideas and theories since the law of copyright only protects an author's mode of expression and not his ideas.*

Greenbie v. Noble, 151 F. Supp. 45, 67 (S.D.N.Y. 1957). (Emphasis added.)

Both the district court and the court of appeals correctly found that petitioner owns no copyright in the facts set forth in his book.

(ii) Purported Facts

Aside from the facts of the Hindenburg disaster that are generally known from sources other than petitioner's book, his book clearly represents itself to be a factual account of the last flight of the Hindenburg. Of his own work, petitioner states:

> This, however, is the *chronicle* of those who would — and did — harm a dirigible . . . .

Who Destroyed the Hindenburg? (p. XIV). (Emphasis added.)

In addition, petitioner's book is labeled as a non-fiction work, and although he contended at the outset of this lawsuit that said work was fiction (*see, e.g.*, SA144), petitioner now admits, as he must, that *Who Destroyed the Hindenburg?* is a work of non-fiction (Petitioner's Brief at 5).

Two related consequences flow from this. First, any facts reported by petitioner in his work that were discovered by him alone (assuming that is the case) are no more copyrightable than any other facts, notwithstanding his research to find said facts. *See, supra.* Second, as to those matters in his book which indeed

are not facts, but were represented to be such, he is now estopped to deny that they are facts. As stated in *Greenbie v. Noble*, 151 F. Supp. 45, 67 (S.D.N.Y. 1957):

> "...[*H*]*e who puts forth a thing as verity shall not be heard to allege for profit* that it is fiction." Davies v. Bowes, D.C.S.D.N.Y., 1913, 209 F. 53, 55, affirmed 2 Cir., 1914, 219 F. 178.

(Emphasis added.)

That rule was reaffirmed in *Huie v. National Broadcasting Company*, 184 F. Supp. 198, 199-200 (S.D.N.Y. 1960):

> Plaintiff counters with a demonstration that several of the episodes which appear in both works are the products of his imagination and thus may not be classed as historical facts. Defendants' reply to this is that plaintiff *represented his story to be a true* story and that he is *estopped to say* that the episodes are not historical.
>
> *Defendants are correct in this position.*

(Emphasis added.) *Also, Lake v. Columbia Broadcasting System, Inc.*, 140 F. Supp. 707 (S.D. Cal. 1956).

Indeed, even if petitioner had not called his book a chronicle, its mere presentation as a factual account, without express language to that effect, would prevent him from claiming that his work is not a work of historical fact. *Davies v. Bowes*, 209 Fed. 53 (S.D.N.Y. 1913), *aff'd*, 219 Fed. 178 (2d Cir. 1914). The creation of a new rule to the contrary would put an unconscionable burden on the author of any succeeding work and would effectively bar the use of secondary source material.

(iii) Scenes a Faire

Other claimed similarities between the book and the film asserted by petitioner arise from the fact that any two treatments of an actual historical event such as the Hindenburg air disaster will in all probability have common elements, *e.g.*, a discussion of prior lighter-than-air craft, baggage searches prior to boarding (JA339 ¶17), discussion of possible sabotage while on board, scenes of the passengers during the voyage, scenes of the landing and of the dirigible exploding (JA347 ¶¶46, 48, 57, 59, 63, 64, 69), scenes of the crowd waiting at Lakehurst and scattering on the airship's fiery descent, scenes of passengers trying to escape the flames or tumbling about the ship during the crash, Joseph Spah's famous leap from the burning airship, Herb Morrison's memorable radio commentary during the disaster and scenes of rubble after the fire (JA351 ¶¶63, 69). Of course, where sabotage is the main thrust of the story, as in Universal's motion picture, then it follows that scenes of FBI and police investigations (JA346 ¶42), likely bomb sites (JA349, 352 ¶¶55, 73), discussions of anti-Nazi plots (JA335 ¶3), prior sabotage attempts (JA336 ¶6), and the checking of suspects and the like are to be expected. Petitioner points to each of the above as an example of copying. Obviously, no cause of action may be sustained on such a basis. *Alexander v. Haley, supra; Reyher v. Children's Television Workshop, supra.*

These types of similarities were discussed by Judge Yankwich in his article *Originality in the Law of Intellectual Property,* 11 F.R.D. 457 (1951), wherein he noted that in a case where one scene must follow a given situation, similarities are not the result of copyright infringement:

> These cases indicate that when you are dealing with a common idea, no matter how different the treatment may be, common elements will speak in both products. Insofar as these common elements are distinct, they amount to creative

> originality. And, in so considering them, the similarities which are traceable to the common source are disregarded. But similarities may appear which are inherent in a situation. The French refer to them as *scenes a faire,* — that is, scenes which *must* follow a certain situation.

Yankwich, supra at 462 (emphasis in original); *Reyher v. Children's Television Workshop, supra* at 91.

Indeed, a brief glance at part of petitioner's list of claimed similarities between the film and his book set forth in Universal's Appendix shows the specious nature of his claim.

Petitioner's claims refer to (1) historical fact; (2) events represented to be historical fact by petitioner; (3) *scenes a faire;* (4) purely fictional situations invented by Nelson Gidding, none of which is copyrightable by the petitioner; and (5) completely dissimilar scenes. *See Norman v. Columbia Broadcasting System Inc.,* 333 F. Supp. 788 (S.D.N.Y. 1971).

In comparing the actual text of Mr. Hoehling's work with the final exhibited version of the motion picture, he does not, and indeed cannot, point to any probative textual duplications of expression (SA028).[5] A comparison of the two works clearly shows that any similarity is based upon the fact that both are relating the same historical event and any similarity of ideas and theories, which are not protectable, is only a result of the common subject matter, cliches and *scenes a faire.*[6]

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5. *See* Judge Metzner's opinion at pp. 6-7 (JA081-082; A20, 21).

6. Indeed, petitioner's recognition of the lack of probative similarities between his work and Universal's film is evidenced by his reliance on the so-called "Inverse-Ratio Rule" (Petition at 31) which states that the greater the degree of access shown, the less a plaintiff need show of substantial similarity. This "rule" has been expressly rejected in *Arc Music Corp. v. Lee,* 296 F. 2d 186 (2d Cir. 1962) and cannot be employed by petitioner to circumvent his obvious inability to satisfy his burden of establishing substantial similarity.

II.

NO CONFLICT AMONGST THE CIRCUITS EXISTS.

Petitioner cannot claim that by employment of a theory similar to his, and by using his book for factual background research, Universal appropriated his research. 2 *Nimmer on Copyright* §3.04 at 3-15, 3-16 (perm. ed. rev. 1980) (hereinafter "*Nimmer*"). With respect to the alleged copyrightability of petitioner's research, noted copyright commentator Prof. Melville Nimmer has stated:

> No one may claim originality as to facts. Facts may be discovered, but they are not created by an act of authorship. One who discovers an otherwise unknown fact may well have performed a socially useful function, but the discovery as such does not render him an "author" in either the constitutional or statutory sense.

2 *Nimmer* §2.11(A) at 2-158.

Consequently, the researcher is not an "author" of a "writing" that is capable of copyright protection. To hold otherwise could allow *only* the researcher who discovered the fact to write about it, and that would violate the intent of the copyright clause and would simply end debate, discussion and research with respect to such issues. However, even were that not the case, Universal cannot be said to have appropriated petitioner's research. As Mr. Hoehling himself has admitted (Exhibit 1001, SA144), at most, Universal adopted only his basic theory of Eric Spehl as the Hindenburg's saboteur.

Petitioner has attempted to conjure up a conflict in the circuits by citing *Toksvig v. Bruce Publishing Co.*, 181 F. 2d 664 (7th Cir. 1950). As discussed below, *Toksvig* was decided on an issue very different from the one involved in this case and is readily distinguishable.

Petitioner's request for a writ presents no area of controversy not previously before and rejected by this Court. One of the foundation stones of the Second Circuit opinion in this case is *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F. 2d 303 (2d Cir. 1966), *cert. denied,* 385 U.S. 1009 (1967).

In *Rosemont,* the Second Circuit as far back as 1966 specifically rejected the reasoning of *Toksvig,* when it said, *inter alia:*

> We, however, cannot subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material *Cf. Oxford Book Co. v. College Entrance Book Co.*, 98 F. 2d 688 (2d Cir. 1938). It is just such wasted effort that the proscription against the copyright of ideas and facts, and to a lesser extent the privilege of fair use, are designed to prevent.

Rosemont Enterprises v. Random House, Inc., supra at 310; also quoted in *Norman v. Columbia Broadcasting System, Inc.*, 333 F. Supp. 788, 796 (S.D.N.Y. 1971).

This Court denied certiorari in *Rosemont* and should do so in the instant case.

Yet there is even a more striking reason why *Toksvig* fails to aid petitioner. In *Eisenschiml v. Fawcett Publications, Inc.*, 246 F. 2d 598 (7th Cir.), *cert. denied,* 355 U.S. 907 (1957) the Seventh Circuit distinguishing *Toksvig,* found that the defendant had not made an unfair use of plaintiff's books *Why Was Lincoln Murdered?* and *In The Shadow of Lincoln's Death* in the creation of his article on the same subject entitled "America's Greatest Unsolved Murder". Plaintiff alleged that the defendant appropriated the underlying "theme" of his works, — "the theme that Secretary of War Stanton may have been implicated in the

assassination, that obstacles were deliberately placed in the way of Booth's capture, and that there are other unexplained mysteries". *Id.* at 601. The Master found for defendant and the Seventh Circuit, the circuit of *Toksvig,* affirmed.

Eisenschiml reveals the major and obvious distinction between this case and *Toksvig. Toksvig* was a *fair use* case and did not turn on the copyrightability of ideas, historical themes, tneories or speculations. *See Public Affairs Associates, Inc. v. Rickover,* 284 F. 2d 262, 272 (D.C. Cir. 1960). Contrary to petitioner's obviously strained effort to bring this action within Rule 17 of the Rules of this Court, there in fact exists no conflict in the circuits.[7]

III.

THE COURT SHOULD CONSIDER ONLY THE ALLEGEDLY INFRINGING WORK.

In his petition, Mr. Hoehling makes no attempt to show any similarity between his book and the film, and even as to respondent Mooney petitioner relies heavily on Mooney's preparatory notes in an attempt to establish a case of substantial similarity. It is well-settled law, however, that where the infringing item is alleged to be a motion picture, the plagiarism *must be found in the film alone.* For example, in *Cain v. Universal Pictures Co.,* 47 F. Supp. 1013, 1017-18 (S.D. Cal. 1942) the court stated:

> [T]he wrong done to the plaintiff in a case of this character does not lie in the mere copying of his material, which, without publication or

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7. Since *Miller v. Universal City Studios, Inc.,* 460 F. Supp. 984 (S.D. Fla. 1978), *appeal pending,* has not yet been argued before the Fifth Circuit it can hardly be used to create a conflict in the circuits.

> incorporation into a motion picture, would result in no injury to him. It consists of (1) the deliberate appropriation of a portion of his work and its delivery to others for (2) inclusion in the finished picture and (3) exhibition to the public.

In *DeMontijo v. Twentieth Century-Fox Film Corp.*, 40 F. Supp. 133, 138 (S.D. Cal. 1941), the court held that "the ultimate test of infringement must be the motion picture film as actually produced, and exhibited," and in *Fuld v. National Broadcasting Company, Inc.*, 390 F. Supp. 877, 882 n.4 (S.D.N.Y. 1975), the court refused to consider alleged similarities between plaintiff's script and defendant's script when the alleged similarities did not also appear in defendant's movie.

> Since the ultimate test of infringement must be the television film as produced and broadcast — and not the preliminary scripts — we have confined our analysis to the remaining . . . scenes which were in the film as produced and broadcast.

Consequently, the court should look to the film and not to vague references of notes of a co-respondent or even to scene descriptions in "The Hindenburg" screenplay that do not actually appear in the film.

Petitioner acknowledges on page 17 of his petition that he has no case against the film "The Hindenburg" itself, but that whatever case he has is against the book and that the case against the film is entirely *derivative.* Both the district court and the court of appeals recognized the distinct and separate characteristics of the film. The court of appeals specifically acknowledged that the motion picture was not a mere film version of Mooney's book, but instead was a different work and followed a different "Grand Hotel" formula so common to "disaster films".

Beyond the general story line, petitioner's and Universal's works are entirely dissimilar in their respective thematic and episodic treatments. Each is distinct from the other in selection of plot incidents founded on public domain sources and in the arrangement and adaption of such incidents.

The pattern of the two works is entirely different. As stated by the district court, petitioner's book is in two parts, the first describing in reportorial fashion the last voyage of the Hindenburg and the second reporting the official investigations of the disaster and, in the last few pages, the author's theory of the destruction. Universal's film centers upon its protagonist, Ritter, and his internal conflict regarding his assignment to protect the Hindenburg and his hatred for his superiors and the Nazi regime. The climax of the film involves the irony of Ritter's eventual about-face and joining forces with the saboteur in bringing about the Hindenburg's destruction (JA238-240). Moreover, the film proceeds chronologically with the saboteur revealed through the course of the action. Nor is there any question as to his identity.

Whereas petitioner's book purports to be a scholarly historical account or "chronicle" which proposes a plausible, if not universally accepted, theory of the Hindenburg's destruction, Universal's film, while containing some facts common to petitioner's book, is primarily an entertainment "detective" film in which the audience follows Ritter through the ship as he investigates each passenger "suspect" as a potential saboteur. Any remaining resemblance between the two works arises from the nature of the common subject matter.

Petitioner, at his own peril, fails to come to grips with the fact that the two works are completely different works, apart from the most general of plots. *This alone should merit a denial of the petition as to respondent Universal.*

This action, now five years old, is based upon petitioner's misconception of what is subject to copyright protection. As

stated by the court in *Rosen v. Loew's, Inc.*, 162 F. 2d 785, 788-789 (2d Cir. 1947):

> In copyright we have become accustomed to actions without shadow of merit. Apparently the conviction of which authors and composers cannot be disabused, extends to their assignees; that the finest gossamers of similarity can be made to serve. The prizes are large; the security of the foundation often seems to be in inverse proportion.

IV.

SUMMARY JUDGMENT WAS APPROPRIATE IN THE PRESENT ACTION.

Petitioner cites *Arnstein v. Porter,* 154 F. 2d 464 (2d Cir. 1946), to support his position that the district court erred in granting summary judgment for respondents. However, *that test has long since been abandoned. SEC v. Research Automation Corporation,* 585 F. 2d 31 (2d Cir. 1978); *Dressler v. M.V. Sandpiper,* 331 F. 2d 130 (2d Cir. 1964). *Moore's Federal Practice* ¶56.17(14).

In *Millstein v. Leland Hayward, Inc.*, 10 F.R.D. 198, 199 (S.D.N.Y. 1950), where the defendant had, as here, conceded access, Judge Rifkind granted the defendant's motion for summary judgment.

> Ever since *Arnstein v. Porter,* 2d Cir. 1946, 154 F.2d 464, district courts have treated motions for summary judgment in plagiarism suits with caution. But unless Rule 56 is to be completely nullified in this type of action, it requires that judgment be granted to the defendants in this case. If Rule 56 is impotent to protect the

> defendants in this case against the expense of trial, it might as well be excised from the federal rules.

Id. at 199.

Summary judgments have been granted frequently in cases of alleged copyright infringement in recent years. *See, e.g., Alexander v. Haley, supra; Musto v. Meyer, supra; Fuld v. National Broadcasting Company, supra; Gardner v. Nizer, supra; Costello v. Loew's Inc.*, 159 F. Supp. 782 (D.D.C. 1958); *Miner v. Employers Mutual Liability Ins. Co.*, 229 F. 2d 35 (D.C. Cir. 1956); *Buckler v. Paramount Pictures, Inc.*, 133 F. Supp. 223 (S.D.N.Y. 1955). Application of *Arnstein* would be inappropriate in any case here even if it were still good law since in *that* case there was a triable issue of fact on the question of *access* and in this action the respondents conceded access. The only remaining issue was of substantial similarity of protectable material and this issue may be determined by the Court through a comparison of the two works. *Alexander v. Haley, supra; Musto v. Meyer, supra; Fuld v. National Broadcasting Company, supra; Dugan v. American Broadcasting Corporation*, 216 F. Supp. 763 (S.D. Cal. 1963); *Costello v. Loew's, Inc., supra; Nimmer* §§13.01(B) and 13.03(A). The district court properly made that comparison and then granted Universal's and Mooney's motions for summary judgment and the Second Circuit affirmed that decision.

Nor was Universal's renewed motion for summary judgment barred by the prior denial of the motion by the United States District Court for the District of Columbia. A prior denial of summary judgment does not bar a party from renewing the motion. *Kirby v. P.R. Mallory & Co., Inc.*, 489 F. 2d 904 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974); *Middle Atlantic Utilities Co. v. S.M.W. Development Corp.*, 392 F. 2d 380 (2d Cir. 1968); *Brownfield v. Landon*, 307 F. 2d 389 (D.D.C.), *cert. denied*, 371 U.S. 924 (1962); *Bon Air Hotel v. Time, Inc.*, 426 F. 2d 858 (5th Cir. 1970); *Dictograph Products Co. v. Sonotone*

Corp., 230 F. 2d 131 (2d Cir. 1956); *GAF Corp. Circle Floor Co.*, 329 F. Supp. 823 (S.D.N.Y. 1971), *aff'd*, 463 F. 2d 752 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973).

The cases clearly show that a previously denied motion for summary judgment may be granted when an expanded record demonstrates that there is no triable issue of fact, *see, e.g., Middle Atlantic Utilities Co. v. S.M.W. Development Corp., supra; Brownfield v. Landon, supra.*

Judge Smith's denial of Universal's original motion for summary judgment was made prior to the taking of any discovery whatsoever. Therafter the parties engaged in extensive discovery over a three-year period prior to the resubmission of the motion on October 19, 1978. On the basis of that expanded record and the two works, the district court found that there was no triable issue of fact and the court of appeals affirmed that judgment.

V.

ABSENT INFRINGEMENT, PETITIONER'S UNJUST ENRICHMENT CLAIM BASED UPON UNFAIR COMPETITION WAS ALSO CORRECTLY DISMISSED.

In addition to his copyright infringement claim, petitioner has also made a claim of unjust enrichment. However, as Universal has shown, there has been no infringement of the petitioner's work and therefore his claim for unjust enrichment, based as it is on his claim of infringment, falls under the doctrine of federal preemption.

Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 223 (1964) and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964), known collectively as the *Sears/Compco* doctrine, make it perfectly clear that when a work is unprotected or unprotectable by copyright it may be copied at will. *B. H. Bunn Co. v. AAA Replacement Parts*, 451 F. 2d 1254 (5th Cir. 1971);

Ideal Toy Corp. v. Kenner Products, 443 F. Supp. 291 (S.D.N.Y. 1977); *Sinatra v. Goodyear Tire & Rubber Co.,* 435 F. 2d 711 (9th Cir. 1970).

Nor was the doctrine of unfair competition, with respect to uncopyrightable elements, enlivened by *Goldstein v. California,* 412 U.S. 546 (1973). The Court in that case held that the State of California could protect sound recordings infringed prior to 1972 even though no such protection was afforded under federal statutory law until 1972. The Court in *Goldstein* rejecting the claim that the copyright field was preempted by federal legislation in the area and holding that the Congress had *neither expressed its wish to protect nor not to protect* sound recordings manufactured before 1972, found that the State of California could act to protect such recordings. Congress has acted to protect the broad category of literary writings and has also expressed its wish that the "ideas" contained within those writings should not be capable of protection. Consequently, petitioner cannot protect through the back door what he could not protect throught the front. *Triangle Publications, Inc. v. Sports Eye, Inc.,* 415 F. Supp. 682 (E.D. Pa. 1976); *Jacobs v. Robitaille,* 406 F. Supp. 1145 (D.N.H. 1976). Ideas and theories, even if newly researched, are to remain free for all to use.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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APPENDIX [1]

1. Scene 8, an alleged infringing similarity, shows stock newsreel footage of the LZ126, rechristened *The Los Angeles*, with a voice-over explanation.

2. Scene 9, alleged to infringe plaintiff's work shows stock newsreel footage of the airship Graf Zeppelin again with a voice-over explanation.

3. Scene 11-A, alleged to infringe, shows the inside of the Hindenburg.

4. Scenes 374 through 376, 399, 472, 474 and 475, alleged to infringe, are a re-enactment of Herb Morrison's *actual historic radio broadcast* of the air disaster.

5. Scene 419, alleged to infringe, is *stock newsreel footage* of the actual Hindenburg explosion.

6. Scenes 429-A through F, alleged to infringe, show a re-enactment of Joseph Spah's famous jump from the burning airship.

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1. The list referred to is from petitioner's answers to Universal's first set of written interrogatories (JA275-277). As petitioner did not favor Universal with the specific page of his work that each of the above is alleged to have infringed (JA274), Universal cannot prepare a side-by-side comparison. It should be clear nevertheless, that each of the above scenes is a non-copyrightable *scene a faire, see infra.* It should be noted, however, that it is difficult to discuss petitioner's alleged similarities since they change with each new pleading, *see, e.g.,* petitioner's answers to defendant Universal's interrogatories (JA274), petitioner's supplemental interrogatory answers (JA282), petitioner's memorandum of law in opposition to Universal's motion for summary judgment and petitioner's supplemental memorandum of law (JA331). Never are petitioner's so-called similarities described the same way twice. However, since the district court decision specifically referenced the similarities as stated in petitioner's supplemental memorandum of law, Universal will also refer to the allegations as they are set forth in that argument.

7. Scene 308, alleged to infringe, reads as follows:

EXT. THE HINDENBURG AND AIRFIELD — DAY — MATTE

Approaching the field, she appears out of dark clouds. Lightning flashes, followed by distant thunder. Carnival atmosphere outside the fence. Cars arriving . . . vendors selling Eskimo pies, hot dogs, pennants and long balloons marked "Hindenburg" . . . People crowd the fence, standing on car tops.

8. Scene 407, alleged to infringe, reads:

INT. THE HINDENBURG — DAY — DINING ROOM PROMENADE

Passengers crowd the observation windows; Breslau, Valarie, wearing white gloves and holding a picture hat; the two boys in Buster Brown suits; the sweet-faced old lady carrying a carpetbag; and others. With a muffled thump the ship shudders.

9. Scene 407-A, alleged to infringe, reads:

EXT. HINDENBURG — DAY — STOCK #1A

The flaming ship tilts sharply aft.

10. Scene 407-B, alleged to infringe, reads:

INT. 'A' DECK PROMENADE — DAY

Passengers at the observation windows are tumbled down the slanted deck, piling on top of

each other, shouting, screaming, the dining salon furniture crashing into them.

11. Scene 413, alleged to infringe, reads:

EXT. LANDING CIRCLE & DAY — WIDE ANGLE — SHOOTING DOWN

Sailors and civilians scatter wildly. People, cars, the mast, the ground, light up in the glow.

12. Scene 434, alleged to infringe, reads:

INT. 'B' PASSAGEWAY — DAY

Arm in arm, Pajetta, Napier and the Countess move along the slanted passage through smoke and occasional flame. Napier hugs the backgammon board. Pajetta taps exploringly with his cane at the obscured floor. A cracking sound . . . The smoke partially clears. Before them the debarkation stairway, burned from its fitting, falls into place on the ground. Unsurprised by this stroke of luck, Napier gestures 'after you' to the Countess. He and Pajetta hurry behind her down the stairs.

(Any claimed similarity with respect to this scene is especially remarkable since each of the above characters is a fictional creation of author Gidding and none of these characters appears in plaintiff's work.)

13[2]. Petitioner's comparison No. 31 (JA342-343):

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2. Comparisons 13-17 are taken from the seventy-five alleged instances of copying as set forth in petitioner's latest incarnation of similarities, his supplemental memorandum of law in opposition to Universal's motion for summary judgment (JA331, *et seq.*). These so-called similarities were specifically referenced by Judge Metzner.

Petitioner's book, p. 30, lines 17-20:

Now, the hatchways were finally secured, and the *Hindenburg* again was made ready for the command so familiar to those of the lighter-than-air fraternity: "Up ship!" Neither passengers nor spectators had many seconds to wait.

Universal's scenes 70-A through 70-C, alleged to have infringed p. 30, lines 17-20:

70-A ANGLE PAST ONLOOKERS TOWARD PROMENADE WINDOWS — MATTE

Onlookers watch the passengers and wave farewell.

70-B INT. CONTROL CAR — NIGHT — PROCESS

Pruss leans out the window, shouting through the megaphone:

PRUSS

Up Ship!

70-C EXT. HINDENBURG — NIGHT — DOWN SHOT

as linesmen drop their ropes.

14. Petitioner's comparison No. 33 (JA343):

Petitioner's book, p. 33, lines 21-26:

By 8:30 the *Hindenburg* was droning along at her cruising speed of 77 knots. The *Normandie*, the

Queen Mary and the *Europa* might be greyhounds of the seas, but there was nothing fast or even sleek about the portly *Hindenburg*. She was the truck horse, the slow, Victorian-comfortable brougham of the airways.

Universal's scene 241 alleged to have infringed p. 33, lines 21-26:

241 ANGLE ON RITTER AND DOUGLAS

RITTER
(looking up)
You'd better tell me about this, Mr. Douglas.
(reaching in pocket)
And while you're at it also explain these in code.

DOUGLAS

I don't have to explain a damn thing to you. Get out.

Ritter's answer is to lock the door. Douglas glances uneasily at his watch.

RITTER

Set it back to Frankfurt time, Douglas. That's where a fast police car will be meeting you in —
(glancing at watch)
roughly ninety-four hours — barring accidents, of course.

Measuring him, Douglas decides on another approach.

DOUGLAS

Okay, I'll tell you, Ritter — but you gotta let me send that message. It may mean the difference.

RITTER

To what?

DOUGLAS

To pulling off the biggest deal of my life. Right now I'm in a race to beat my competitor into New York.

RITTER

Who?

DOUGLAS

Fred Seemans, head of Seemans & Poelzig. He's on the *Queen Mary*. Left a day and a half before us. In the messages we call his outfit the Sharks, mine the Hawks.

RITTER
(half-smiling)
By sea and by air and both carnivorous.

DOUGLAS

Tomorrow it'll be announced that General Motors has acquired the Opel Motor Company. The advertising account will be up for grabs. The outfit getting there first will have the jump.

RITTER

Well, let's just find out if there is a Fred Seemans aboard the *Queen Mary.*

15. Petitioner's comparison, No. 41 (JA343):

Petitioner's book, p. 54:

On into the wild night sailed the Hindenburg, her motion gentle, like the rockings of some great cradle, the drum-roll of the wind and rain against her sixth-of-a-mile length a lullaby. On flew this giant of human creation, easily carrying its burden of ninety-seven human beings, its cargo of mail, of films and tobacco leaves, partridge eggs, fancy goods, airplane parts, propaganda material, two dogs and . . .

. . . and something else, far from inocuous, something meticulously hidden and *not* to be found on the manifest. It was not quite ready yet. Its assemblage was not entirely complete. But it was there, waiting. (Ellipses and emphasis in original).

Universal's scenes that allegedly infringe p. 54:

37 CLOSEUP — THE BOMB WITH WORKS EXPOSED (SEE APPENDIX #3)

Held in a hand, it is a rectangle about 2" wide and 5" long with complicated wheels and tiny gears. It is being tested. In utter silence the black timer needle revolves. When it reaches the detonation point, it stops with a click.

111 CLOSEUP — THE BOMB

held in the same hand, but behind it now is the throb of the ship's engines establishing beyond all doubt that the bomb is aboard the *Hindenburg*.

247 MONTAGE

A) SMOKING ROOM

Ritter stares out the window. Napier, sitting with Pajetta, the Countess, Howell and the Japanese diplomat, opens a new pack of cards to begin a poker game. Ritter leaves, exchanging a look with the Countess.

B) RADIO ROOM

As Ritter enters, Speck turns, shakes his head "no news."

C) CLOSEUP OF THE BOMB

in the same hand as before. The saboteur's eye lowers to an inch of it, inspecting the infernally compact mechanism.

16. Petitioner's comparison, No. 48 (JA347):

Petitioner's book, p. 74, lines 7-11:

. . . host of amateur and semi-amateur cameramen. Among the latter was George Willens, head of a Detroit firm of advertising typographers, who would take movie films of the *Hindenburg's* arrival. Then with his seventeen-year-old son, Harvey, he was booked for the airship's return voyage.

Universal's scene 263 alleged to have infringed p. 74, lines 7-11:

> 263 INT. HANGAR — DAY — WAITING ROOM SECTION
>
> Some thirty men, including Zeppelin Company officers, New Jersey Police, U.S. Customs and Immigration officials, reporters and Detectives Moore and Grunberger, organize themselves for the arrival of the *Hindenburg*.

17. Petitioner's comparison, No. 50 (JA348):

> Petitioner's book, p. 81, radio message:
>
> At 3:30 DEKKA advised NEL:
>
> COURT LAKEHURST PLEASE SEND WEATHER.
>
> The answer sped back in five minutes:
>
> BROKEN CUMULUS CLOUDS SURFACE WIND 20 KNOTS BAROMETER 29.63 FALLING SLOWLY
>
> Then Pruss, mindful of necessary but non-operational considerations, ordered the information transmitted:
>
> CREW DINNER WILL BE SERVED ON BOARD.
>
> At this time, Lehmann himself wirelessed a tribute to Hamburg, where a memorial was being unveiled by the Hamburg . . .

Universal's scene 31 alleged to have infringed p. 81's radio message:

311 INT. HINDENBURG -- DAY — CONTROL CAR

DIMMLER

Signal red, Captain.

PRUSS

(behind him)

Thank you kindly. I thought it was a Christmas tree.

(to Speck at phone)

Send this to Fellows: Riding out weather. Shall delay landing until further notice from NAL. Looking forward to dinner. Pruss.